

2002

THE STATE OF UTAH, : Appellee and Petitioner,  
: v. : MANUEL ERNESTO SAMORA, : Appellant  
and Respondent: Brief of Appellee

Utah Supreme Court

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### Recommended Citation

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Appellee/Petitioner, :  
v. :  
MANUEL ERNESTO SAMORA, : Case No. 20021038-SC  
Appellant/Respondent. :

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**BRIEF OF RESPONDENT  
ON CERTIORARI REVIEW**

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**FILED**  
UTAH SUPREME COURT  
JUL 31 2003

PAT BARTHOLOMEW  
CLERK OF THE COURT

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**JURISDICTIONAL STATEMENT**

This Court granted the state's petition to review the Court of Appeals' decision in State v. Samora, 2002 UT App 384, 59 P.3d 604 (Samora II). A copy of that decision is in Addendum A. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3) (2002).

**STATEMENT OF THE ISSUE AND STANDARD OF REVIEW**

Issue: The only issue on certiorari, as articulated by Petitioner, the State of Utah, is whether "a sentence [can] be illegal for purposes of [Utah Rule of Criminal Procedure] 22(e), but nevertheless limit the range of resentencing on remand?" Petitioner's Brief ("Pet. Brf.") at 2.

Standard of review: On certiorari, this Court reviews the decision of the Court of Appeals for correctness. See State v. Layman, 1999 UT 79, ¶3, 985 P.2d 911 (citing Butterfield v. Okubo, 831 P.2d 97, 101 n.2 (Utah 1992)). In so doing, it applies the standard of review utilized by the Court of Appeals in analyzing the issue. Id. The Court

of Appeals properly applied a correctness review in analyzing the sentencing error that occurred in this case. Samora II, 2002 UT App 384, ¶7 (citing State v. Kenison, 2000 UT App 322, ¶7, 14 P.3d 129).

### **OPINION BELOW**

The Court of Appeals' opinion in Samora II, 2002 UT App 384 is in Addendum A.

### **STATUTE, RULE AND CONSTITUTIONAL PROVISIONS**

The following statute, rule and constitutional provisions are relevant to the issue raised on certiorari. The texts of the statute, rule and constitutional provisions are in Addendum B.

Utah Code Ann. § 76-3-405 (1999);

Utah R. Crim. P. 22(e);

Fifth Amendment, United States Constitution;

Fourteenth Amendment, United States Constitution.

### **STATEMENT OF THE CASE**

On April 18, 2000, the state charged Respondent/Defendant Manuel Samora ("Respondent" or "Mr. Samora") with unlawful control of a motor vehicle with the intent to temporarily deprive, a third degree felony, in violation of Utah Code Ann. § 41-1a-1314 (1998). R. 07. On August 8, 2000, Mr. Samora pled guilty to attempted unlawful control of a motor vehicle with intent to temporarily deprive, a class A misdemeanor,

before Third District Court Judge Robin W. Reese. R. 63. Judge Reese scheduled sentencing for September 22, 2000 before Third District Court Judge J. Dennis Frederick. R. 63:80.

When Mr. Samora did not appear at sentencing on September 22, 2000, Judge Frederick sentenced him *in absentia* to the maximum one year sentence, imposed a fine of \$2500 with a surcharge of \$2119.05, and imposed attorney fees of \$250. R. 42-43; see original judgment in Addendum C. Judge Frederick did not impose restitution in the original judgment. R. 42-43.

Mr. Samora appealed the original judgment, claiming that he was sentenced in violation of due process and Utah Rule of Criminal Procedure 22(a). In an opinion issued September 7, 2001, the Court of Appeals agreed with Mr. Samora's claims, vacated the sentence, and remanded the case for resentencing. See State v. Samora, 2001 UT App 266 (unpublished) (Samora I), a copy of which is in Addendum D.

At resentencing, Judge Frederick refused to give Mr. Samora credit for the approximately six months of jail time he served on the previous sentence that had been illegally imposed. See transcript of November 16, 2001 resentencing (R. 122); see also judgment (from which this appeal was taken) entered after resentencing, a copy of which is in Addendum E. Immediately after resentencing, Mr. Samora filed a motion asking Judge Frederick to reconsider the denial of credit for time he had served on this case. On December 3, 2001, while that motion was still pending, Mr. Samora filed a notice of

appeal from the second judgment. Judge Frederick thereafter granted the motion to reconsider and gave Mr. Samora credit for the jail time he had already served on this case. See R. 118.

On November 15, 2002, the Court of Appeals issued its decision in Samora II, holding that the sentencing judge violated due process and Utah Code Ann. § 76-3-405 (1999) when he imposed a harsher sentence after the original sentence was vacated on appeal. Samora II, 2002 UT App 384, ¶23; see Addendum A. The state filed a timely petition for writ of certiorari and this Court agreed to review the sole issue of whether a sentence can "be illegal for purposes of [Rule] 22(e), but nevertheless limit the range of resentencing on remand?" State's petition for writ of certiorari at 1.

### **STATEMENT OF THE FACTS**

Mr. Samora was charged with taking his girlfriend's car on March 31, 2000.

R. 07, 21. According to the plea affidavit, he had been living with his girlfriend for over three years at the time, and he did not intend to permanently deprive her of the vehicle.

R. 21.

When Mr. Samora did not appear at the original sentencing, the sentencing judge sentenced him *in absentia* to the statutory maximum jail term but did not impose restitution. R. 42-43. The Court of Appeals vacated that sentence because it was imposed in violation of due process and Utah Rule of Criminal Procedure 22(a).

Samora I, 2001 UT App 266.

While the initial appeal was pending, Mr. Samora was arrested and began serving the one year sentence that was originally imposed. R. 122:3. He served several months of that sentence prior to being resentenced following his successful appeal. R. 122:3.

Having already served a significant portion of the jail sentence at the time he was resentenced, Mr. Samora asked the judge at resentencing to reimpose the one year sentence but give him credit for the several months he had already served, so that he would have "a clean break, get this done, start a new life." R. 122:3. Mr. Samora also asked "the trial court to waive or substantially reduce his fine so that [he] could instead pay restitution." Samora II, 2002 UT App 384, ¶19. Defense counsel stated:

[i]t would be my request on behalf of Mr. Samora that the Court do a couple of things. One, that the Court would waive the fine. There is some restitution owing that was part of the negotiation in this case to the victim. They've - - Mr. Samora and the victim in the case had a fairly long-term relationship before this all happened and there was, as a part of the negotiation, he's to pay some restitution with respect to that.

We'd ask the Court to - - to waive or at least to reduce the fine substantially and - - and ask that the Court give him credit for time served on this case.

R. 122:3-4. Although the state claimed below that Mr. Samora invited the error in imposing a harsher sentence on remand, the Court of Appeals rejected that argument and concluded that "after reading the sentencing proceeding transcript in context, it is apparent that Defendant was asking the trial court to waive or substantially reduce his fine so that Defendant could instead pay restitution," and that Mr. Samora did not agree to the increased sentence. Samora II, 2002 UT App 384, ¶19. The state has accepted the

conclusion that Mr. Samora did not invite this error and has not challenged that determination on certiorari.

The trial court imposed a one year jail sentence but refused to give Mr. Samora credit for the six months he had served since May 16, 2001. R. 122:9. The trial court later corrected this error after defense counsel filed a motion for reconsideration. R. 118-19. The increased restitution remains in place.

### **SUMMARY OF THE ARGUMENT**

Due process and Utah Code Ann. § 76-3-405 preclude the imposition of a harsher sentence after a defendant successfully appeals the initial sentence. The rationale behind the statutory and constitutional protections is to prevent vindictiveness in resentencing and to assure that there is no chilling effect on the exercise of the right to appeal. The United States Supreme Court has recognized that it would be extremely difficult to prove retaliatory motivation and therefore requires that "the constitutional legitimacy" of any increased sentence following a successful appeal must be apparent from the face of the record. See North Carolina v. Pearce, 395 U.S. 711 (1969). In this case where the trial court imposed a harsher sentence after Mr. Samora successfully appealed the illegal manner in which the first sentence was imposed, the Court of Appeals correctly concluded that the harsher sentence violated section 76-3-405 and due process.

The state claims on certiorari that the constitutional and statutory limitations on imposing a harsher sentence after the defendant successfully appeals his initial sentence

do not apply when an appellate court utilizes Utah Rule of Criminal Procedure 22(e) to reach a sentencing issue on appeal. The state's claim fails for two reasons: (1) a review of the decision in Samora I fails to establish that the Court of Appeals utilized Rule 22(e) to reach the issue of whether the original sentence was illegally imposed; and (2) even if the Court of Appeals did reach the issue under Rule 22(e), nothing in the language of the rule or section 76-3-405 allows for harsher sentencing on remand, this Court's decision in State v. Babbell, 813 P.2d 86 (Utah 1991) ("Babbell II") does not allow for harsher sentencing in the context of this case, and the rationale for precluding harsher sentences following a successful appeal applies in these circumstances.

First, a review of the decision in Samora I fails to establish that the Court of Appeals utilized Rule 22(e) to reach the issue of whether the original sentence was illegally imposed; the state's entire premise on certiorari - - that a sentence that is vacated under Rule 22(e) is not subject to the constitutional and statutory limitations on resentencing - - therefore does not apply in this case. Mr. Samora argued in the initial appeal that the claim that he was sentenced in an illegal manner was preserved and, alternatively, that the sentence could be reviewed either under the plain error doctrine or Rule 22(e). Since the Court of Appeals did not clarify how it reached the issue in Samora I, the state cannot establish that the sentencing issue in the original appeal was reached under Rule 22(e).

Second, even if the issue was reached under Rule 22(e), the constitutional and

statutory limitations on resentencing apply when a defendant successfully appeals the manner in which sentence was imposed. As the Court of Appeals recognized, Babbell II does not allow for imposition of a harsher sentence in this case because Babbell II did not involve a situation where a defendant successfully appealed the manner in which his sentence was imposed. Samora II, 2002 UT App 384, ¶15. The rationale behind the statutory and constitutional protections applies with full force in this context where the presumption of vindictiveness raised by the harsher sentence was not rebutted; if the harsher sentence is allowed, a defendant such as Mr. Samora who is sentenced in an illegal manner may well forgo an appeal out of fear that even if he is successful, the sentencing court will impose a harsher sentence at resentencing. The important role of the right to appeal would be undermined by such an approach. Nothing in the rule, section 76-3-405 or cases outlining the due process limitation suggest that the due process and statutory limitations following a successful appeal do not apply when the illegality of the manner in which the sentence is imposed is reached on appeal under Rule 22(e). Accordingly, the Court of Appeals correctly applied those limitations and vacated the sentence in this case.

### **ARGUMENT**

**POINT. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE TRIAL COURT VIOLATED DUE PROCESS AND UTAH CODE ANN. § 76-3-405 WHEN IT IMPOSED A HARSHER SENTENCE AFTER THE ORIGINAL SENTENCE WAS VACATED ON APPEAL.**



In the original appeal, the Court of Appeals vacated Mr. Samora's sentence because it was imposed in violation of due process and Rule 22(a). Samora I, 2001 UT App 266. On remand, the trial court imposed a harsher sentence. Samora II, 2002 UT App 384, ¶19.

Mr. Samora again appealed, this time arguing that the increased sentence following his successful appeal violated due process and section 76-3-405. The Court of Appeals agreed with Mr. Samora that the trial court for a second time illegally imposed his sentence, this time in violation of due process and Utah Code Ann. § 76-3-405. Samora II, 2002 UT App 384, ¶23. The Court of Appeals' decision was correct and should be upheld by this Court.

A. Due Process and Utah Code Ann. § 76-3-405 Prohibit the Imposition of a Harsher Sentence After a Defendant Successfully Appeals the Initial Sentence.

The Fifth Amendment, applicable to the states through the Fourteenth Amendment, "mandates that a sentence after reversal of a criminal conviction cannot be more severe than the original sentence, 'unless the reason for the increased sentence, based on identifiable conduct by the defendant following the original trial, appears in the record.'" State v. Bakalov, 1999 UT 45, ¶73, 979 P.2d 799 (quoting State v. Sorenson, 639 P.2d 179, 180 (Utah 1981)). The purpose of the rule prohibiting a harsher sentence after a defendant successfully appeals is that the rule "works to 'assure that there is no chilling or deterring of the criminal defendant's exercise of his basic constitutional right

appeal.'" Bakalov, 1999 UT 45, ¶73 (quoting Sorenson, 639 P.2d at 181).

As the Court of Appeals recognized, "due process prevents the sentencing judge from increasing the sentence when that increase is motivated by vindictiveness."

Samora II, 2002 UT App 384, ¶9. Due process also protects defendants from a concern that judges may impose a harsher sentence if they successfully appeal a judicial error, thereby ensuring that there is not a chilling effect on the right to appeal. Id. The Court of Appeals stated in Samora II:

In North Carolina v. Pearce, 395 U.S. 711, 725, 89 S.Ct. 2072, 2080, 23 L.Ed.2d 656 (1969), the Supreme Court held that when resentencing a defendant, due process prevents the sentencing judge from increasing the sentence when that increase is motivated by vindictiveness. To free defendants from apprehension of such a retaliatory motivation, the Supreme Court held that "whenever a judge imposes a more severe sentence upon a defendant," the reasons must affirmatively appear on the record and "be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." Id. at 726, 89 S.Ct. at 2081 (further citation and parenthetical omitted).

Samora II, 2002 UT App 384, ¶9.

Protecting a defendant from a vindictive judge and ensuring that there is no chilling effect on the right to appeal are at the heart of the due process protection against imposition of a harsher sentence after a defendant successfully appeals. See generally Pearce, 395 U.S. at 726. Recognizing that "[t]he existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case," the United States Supreme Court required that "the constitutional legitimacy" of any increased

sentence be reviewable on appeal from the face of the record. Id. at 725 n.20, 726.

In order to further the goals of preventing vindictiveness in resentencing or a chilling effect on the right to appeal, "the burden is on the State to establish that [a harsher sentence imposed following a successful appeal] did not violate the requirements of due process and section 76-3-405." Samora II, 2002 UT App 384, ¶8, n.2 (citing Pearce, 395 U.S. at 726). To sustain this burden, the state must point to facts that appear on the record which show "'identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.'" Samora II, 2002 UT App 384, ¶9 (quoting Pearce, 395 U.S. at 766); *but see* Texas v. McCullough, 475 U.S. 134, 140-42 (1986) (suggesting that there might be bases other than conduct by defendant after imposition of the original sentence that would justify imposition of a harsher sentence following a successful appeal).

Utah Code Ann. § 76-3-405 (1999) also precludes the imposition of a harsher sentence after a defendant successfully appeals, and is even "more stringent than the due process protection . . . ." Bakalov, 1999 UT 45, ¶73 (quoting Sorenson, 639 P.2d at 180). Utah Code Ann. § 76-3-405 states:

**76-3-405. Limitation on sentence where conviction or prior sentence has been set aside.**

(1) Where a conviction *or sentence* has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied.

(2) This section does not apply when:

(a) the increased sentence is based on facts which were not known to the court at the time of the original sentence, and the court affirmatively places on the record the facts which provide the basis for the increased sentence; or

(b) a defendant enters into a plea agreement with the prosecution and later successfully moves to invalidate his conviction, in which case the defendant and the prosecution stand in the same position as though the plea bargain, conviction, and sentence never occurred.

Utah Code Ann. § 76-3-405 (1999) (emphasis added). By its terms, the statutory limitation applies when a conviction *or sentence* is set aside on direct review. Id. Like the constitutional provision, the purpose of the statute "is to prevent the chilling effect on the constitutional right to appeal which the possibility of a harsher sentence would have on a defendant who might be able to demonstrate reversible error in his conviction." Babbell II, 813 P.2d at 88. As the Court of Appeals pointed out in Samora II, this Court held in Sorenson that the statute "prevents the Utah constitutional right to appeal (Article VIII, §9) from being impaired 'by imposing on a defendant who demonstrates the error of his conviction the risk that he may be penalized with a harsher sentence for having done so.'" Samora II, 2002 UT App 384, ¶11 (quoting Sorenson, 639 P.2d at 180 (quoting Chess v. Smith, 617 P.2d 341, 343 (Utah 1980))).

The statute is "more stringent than the due process protection, [and] 'allows for no exceptions.'" Bakalov, 1999 UT 45, ¶73 (quoting Sorenson, 639 P.2d at 180). "The meaning of a 'more severe' sentence is clear. 'The second sentence cannot exceed the

first in appearance or effect, in the number of its elements, or in their magnitude.’”

Bakalov, 1999 UT 45, ¶73 (quoting Sorenson, 639 P.2d at 181 (further citation omitted)). The statutory protection precludes the addition of a new element in the sentence, the augmentation of any element of the sentence, or "an increase in one element of [the] sentence by elimination of another." Wisden v. District Court, 694 P.2d 605, 606 (Utah 1984). Despite the stringent protections offered by section 76-3-405, the state fails to analyze the language of the statute or explain why the sentence in this case, which was set aside on direct review, is not subject to the section 76-3-405 protections as outlined in the plain language of that statute. The state likewise all but ignores the due process limitation on resentencing following a successful appeal and the rationale for such limitation.

This Court has consistently held that any increase in the severity of a sentence following a successful appeal violates the statutory and constitutional protections. For example, in Bakalov, the Court vacated a fine which was imposed after the defendant successfully appealed his conviction; because the original sentence did not include a fine, this Court held, "[t]he fine the trial court imposed after the second trial undisputably violates these [statutory and constitutional] provisions." Bakalov, 1999 UT 45, ¶73. In Wisden, the Court held that increased jail time after the defendant appealed his justice court conviction violated double jeopardy and the statutory protection against harsher sentences even though the fine was reduced. Wisden, 694 P.2d at 606; see also Chess,

617 P.2d 343 (recognizing that section 76-3-405 and due process require that a defendant's decision as to whether to exercise his constitutional right to appeal "may not be impaired by making it conditional upon the threat of a harsher sentence [following a successful appeal]").

The Fifth Amendment protection against double jeopardy, Utah Code Ann. § 76-3-405, and case law from Utah appellate courts and the United States Supreme Court require that the justification for an increased sentence following a successful appeal must affirmatively appear on the face of the record. See e.g. Pearce, 395 U.S. at 766. In Samora II, the Court of Appeals correctly recognized the importance of this requirement, pointing out that a fear of vindictiveness and a concomitant chilling effect on the exercise of the right to appeal would occur if a trial court were allowed to impose a harsher sentence following a successful appeal without justification appearing in the record. Samora II, 2002 UT App 384, ¶¶9-13, 19.

The Court of Appeals recognized the due process and statutory protections, the protection against vindictiveness and the goal of precluding a chilling effect on the exercise of the right to appeal, and held in this case that the presumption of vindictiveness raised by the imposition of a harsher sentence on remand following a successful appeal was not rebutted in the record. Samora II, 2002 UT App 384, ¶19. In fact, the record suggests vindictiveness on the part of the trial court in that the trial judge increased not only the amount of money Mr. Samora was required to pay as the result of

the conviction, but also the amount of jail time he was required to serve by initially refusing to give him credit for the several months he had served while this case was originally on appeal. *Id.*, ¶¶5-6. Although the trial court subsequently reconsidered the refusal to give credit for time served, the increased restitution nevertheless remained in place. In this case where the justification for the increased sentence did not appear in the record, the Court of Appeals correctly concluded that the presumption of vindictiveness raised by an increased sentence following a successful appeal was not rebutted, and that the harsher sentence violated due process and section 76-3-405.<sup>1</sup> *Id.*, ¶19.

B. The State's Claim that this Sentence Was Vacated Under Rule 22(e) Does Not Change the Court of Appeals' Correct Conclusion that Due Process and Section 76-3-405 Required that this Sentence Be Vacated.

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<sup>1</sup> The State made an alternative argument in the Court of Appeals that the increased sentence was appropriate because the sentencing judge did not know that restitution was owing when he imposed sentence the first time. *Samora II*, 2002 UT App 384, ¶20. The Court of Appeals rejected this argument because restitution was discussed at the plea hearing and outlined in the plea affidavit. *Id.* The fact that the sentencing judge failed to familiarize himself with the record or case at the initial sentencing and instead rushed to impose a sentence in violation of due process and Rule 22(a) "does not satisfy the lack of knowledge requirement found in section 76-3-405 [and due process]." *Id.* at ¶21. Because the trial court "is charged with knowledge of what is in the record" in the case before it, the existence of restitution was not new information that justified an increased sentence. *Id.*

Like its invited error argument, the state did not raise on certiorari its claim that the increased sentence was "based on facts which were not known to the court at the time of the original sentence." *Id.*, ¶20. This claim is therefore not properly before this Court. Instead, the only claim before this Court of certiorari is the state's claim that the due process and section 76-3-405 protections do not apply when a defendant successfully appeals his sentence under Rule 22(e).

The rule prohibiting imposition of a harsher sentence following a defendant's successful appeal "is particularly compelling in this state because there are two explicit state constitutional rights of a criminal defendant to appeal, Article I, section 12 of the Declaration of Rights in the Utah Constitution and Article VIII, section 5." Babbell II, 813 P.2d at 87. Despite the importance of this rule in protecting the right to appeal, Petitioner barely acknowledges the existence of the due process and statutory limitations or the rationale for such limitations, in making the state's argument before this Court. See Pet. Brf. at 8. In fact, while the Court of Appeals based its decision on the fact that this record failed to show that the trial court was not acting vindictively in imposing a harsher sentence as well as the idea that to allow imposition of a harsher sentence under these circumstances would have a chilling effect on the right to appeal, the state disregards these concerns when it argues that imposition of a harsher sentence is always allowed if a court utilizes Rule 22(e) as a procedural tool for reaching the merits of whether the sentence was illegally imposed. See Pet. Brf. at 6-20.

The State's claim that the due process and section 76-3-405 protections do not apply in this case because the Court of Appeals initially vacated the sentence under Rule 22(e) fails for two reasons. First, a review of Samora I and the briefs filed in that case fails to establish that the original sentence was vacated under Rule 22(e). The state therefore cannot establish that its entire premise on certiorari - - that due process and section 76-3-405 do not apply when a sentence is vacated on appeal under Rule 22(e) - -



applies to this case. Second, even if the original sentence were vacated under Rule 22(e), the state is incorrect that the due process and section 76-3-405 protections are not implicated when a defendant successfully appeals a sentence imposed in an illegal manner and utilizes Rule 22(e) to reach the issue because the claim was not raised below.

*1. The Court of Appeals Did Not Rely on Rule 22(e) When It Vacated the Sentence in the Initial Appeal.*

Petitioner's sole claim on certiorari is that an increased sentence is permissible at resentencing when the illegality of the manner in which the initial sentence was imposed was reached on appeal under Rule 22(e). See Pet. Brf. at 2, 6-19. As a threshold matter, this argument fails in this case because the state cannot establish that Mr. Samora's initial sentence was vacated under Rule 22(e) in Samora I.

Mr. Samora argued in his initial appeal that he was sentenced in violation of due process and Rule 22(a). Samora I, 2001 UT App 384, ¶2. He claimed that the issue was preserved; in the alternative, he claimed that the judge committed plain error in sentencing him in violation of due process and Rule 22(a) by not relying on relevant and reliable information and by not affording defense counsel the opportunity to speak at sentencing. See Appellant's opening brief in Samora I at 2-4, 13; see Addendum F.

The Court of Appeals agreed in Samora I that the trial court violated due process and Rule 22(a) when it initially sentenced Mr. Samora, and vacated that sentence.

Samora I, 2001 UT App 266. In so doing, the Court of Appeals did not articulate whether it reached the issue because it was preserved, or under Rule 22(e), or pursuant to

the plain error doctrine. Id. Instead, the Court simply recognized that Mr. Samora raised the same issues regarding sentencing *in absentia*, due process and Rule 22(a) that were raised in Wanosik and stated that the decision in State v. Wanosit, 2001 UT App 241, 31 P.3d 615, was therefore dispositive and required remand for resentencing. Samora I, 2001 UT App 266.

The remainder of the decision in Samora I likewise does not demonstrate that the illegality of the manner in which Mr. Samora was sentenced was reached under Rule 22(e). In fact, footnote 1 suggests that the case was not decided under Rule 22(e) since the Court of Appeals noted the existence of Rule 22(e) and pointed out that if it were to dismiss the appeal in Samora I, as requested by the state, Mr. Samora could nevertheless have the issue reviewed in the trial court pursuant to Rule 22(e). Samora I, 2001 UT App 384, ¶3 n. 1. In an aside, citing Wanosik, the Court also recognized that a defendant can challenge the legality of a sentence under Rule 22(e) even though the issue is raised for the first time on appeal. Id. The Court of Appeals stated in footnote 1:

FN1. Even if we were to dismiss this appeal, Samora could challenge the sentence in the trial court under Rule 22(e) of the Utah Rules of Criminal Procedure. *See* Utah R. Crim. P. 22(e) ("The court may correct . . . a sentence imposed in an illegal manner, at any time."); *see also Wanosit*, 2001 UT App 241 at n. 11 (stating issues regarding illegality of the sentence under Rule 22(a) can be considered for the first time on appeal under Rule 22(e)). Judicial economy suggests that we resolve the appeal from the sentence and preserve the State's ability to seek dismissal in any appeal taken after resentencing.

Samora I, 2001 UT App 266, n. 1. If the Court were already reviewing the illegally

imposed sentence pursuant to Rule 22(e), footnote 1 would have been unnecessary and inconsistent.

Nothing in the Court of Appeals' resolution of Samora I establishes that the issue was reached under Rule 22(e). The state's claim on certiorari that at resentencing, the trial court could impose a harsher sentence because the initial sentence was vacated under Rule 22(e) is not well taken since a fair reading of Samora I fails to demonstrate that the Court of Appeals reviewed the illegally imposed sentence pursuant to Rule 22(e) in Samora I.

*2. Even if the Issue in Samora I Was Reached Under Rule 22(e), the Due Process and Statutory Limitations on Resentencing Nevertheless Apply in this Case Where Mr. Samora Successfully Appealed His Illegally Imposed Sentence; to Allow Imposition of a Harsher Sentence in this Case Would Have a Chilling Effect on the Right to Appeal and Would Allow Vindictiveness in Resentencing.*

The meat of the state's argument on certiorari is that any time a sentence is vacated under Rule 22(e), the sentencing court is free to impose a harsher sentence. See Pet. Brf. at 6-20. The state apparently wants this to be the case regardless of whether the sentence is vacated after a successful appeal by the defendant and regardless of whether allowing the imposition of a harsher sentence would have a chilling effect on the right to appeal or allow vindictiveness in resentencing.

According to the state, cases decided under Rule 22(e) are free from the due process and statutory limitations at resentencing. Pet. Brf. at 6-20. The state says that since Babbell II tells us that the illegal sentence in that case was void and not subject to

the statutory and constitutional limitations, sentences imposed in an illegal manner are likewise void and not subject to the statutory and due process protections. The state claims that the Court of Appeals improperly created two types of sentencing error under Rule 22(e) and a correct interpretation of the rule and Babbell II requires that the due process and statutory limitations do not apply when any sentencing error is reached on appeal under Rule 22(e). Pet. Brf. at 6-20.

A review of Rule 22(e) and case law demonstrates, however, that the state is incorrect since (1) the rule itself recognizes two types of sentencing error, (2) Babbell II does not allow for harsher sentencing after a defendant *successfully appeals* a sentence that was *imposed in an illegal manner*, and (3) the due process and section 76-3-405 rationale for precluding a harsher sentence following a successful appeal applies with full force in the circumstances of this case.

(a) The Plain Language of Rule 22(e) Recognizes Two Types of Sentences that Can Be Corrected at Any Time.

As a preliminary matter, the state incorrectly argues that the Court of Appeals improperly created two types of Rule 22(e) sentencing error in this case. A review of the language of Rule 22(e) establishes that the plain language of the rule, not the decision of the Court of Appeals, recognizes two types of sentencing error, both of which are egregious enough to warrant correction at any time. Because the plain language of the rule acknowledges two types of sentencing error that can be reached at any time, treating illegal sentences distinctly from sentences imposed in an illegal manner is consistent with

the rule.

Rule 22(e), Utah Rules of Criminal Procedure provides, "[t]he court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time." Utah R. Crim. P. 22(e). This rule allows the trial court to reassume jurisdiction to correct an illegal sentence, or a sentence that was imposed in an illegal manner, regardless of the passage of time. Utah R. Crim. P. 22(e); State v. Lee Lim, 79 Utah 68, 7 P.2d 825 (Utah 1932). The rule also allows a criminal defendant to challenge the legality of his sentence on appeal even if the issue was not raised below. State v. Brooks, 908 P.2d 856 (Utah 1995). To challenge a sentence under Rule 22(e) on appeal, however, a timely filed appeal must be in place. See Utah R. App. P. 4(a); Glezos v. Frontier Inv., 896 P.2d 1230, 1233 (Utah Ct. App. 1995) (a timely notice of appeal must be filed for an appellate court to have jurisdiction to review a case); Bowen v. Riverton City, 656 P.2d 434, 436 (Utah 1982) (appellate court "lacks jurisdiction to hear an appeal if a notice of appeal was not timely filed").<sup>2</sup>

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<sup>2</sup> The state contends, without support, that the decision in Samora II "likely abrogates the ordinary requirements for filing a timely notice of appeal" (Pet. Brf. at 5, 14) and suggests that a defendant can challenge sentencing error in an appellate court under Rule 22(e) "even though he does not file a notice of appeal." Pet. Brf. at 13. This is incorrect. A timely notice of appeal is required for an appellate court to have jurisdiction to review a judgment in a criminal case. See Bowen, 656 P.2d at 436. While Rule 22(e) does allow a trial court to reassume jurisdiction in a case in which it imposed sentence, nothing in the rule or Utah decisions suggests that Rule 22(e) creates jurisdiction in an appellate court that never had jurisdiction over a case simply because a defendant filed a Rule 22(e) motion in the appellate court.

Additionally, even if this were the case, there is nothing in Samora II or the issue before this Court on certiorari in this case that creates such jurisdiction. The Court of

By its plain language, Rule 22(e) allows a challenge not only to an illegal sentence, but also to a sentence that was *imposed in an illegal manner*. Utah R. Crim. P. 22(e)(emphasis added). An illegal sentence is a sentence that does not conform to the sentence that is authorized by statute. See e.g. State v. Babbell, 770 P.2d 987, 994 (Utah 1989) ("Babbell I") (sentence was illegal where court did not impose statutorily mandated minimum mandatory prison sentence). A sentence imposed in an illegal manner, on the other hand, is a sentence that is within statutory limits, but which is imposed in a manner that violates a defendant's rights or which is based on erroneous information. See State v. Headley, 2002 UT App 58 n.2 (unpublished) (citing inter alia

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Appeals had jurisdiction in Samora I and Samora II because Mr. Samora filed timely notices of appeal from the first and second judgments; according to the state, the Court of Appeals then used Rule 22(e) as the procedure that made review appropriate in the absence of preservation below. Since Samora II does not indicate that Rule 22(e) creates appellate jurisdiction, the state's discussion of that claim is not pertinent. Nor is the state's claim that using Rule 22(e) in an appellate court to review sentencing error necessarily included in the issue raised by the state in its petition for certiorari.

Moreover, assuming for the purposes of argument that the state is correct that appellate review under Rule 22(e) creates appellate jurisdiction and "likely abrogates the ordinary requirements for filing a timely notice of appeal" (Pet. Brf. at 5, 13), that concern should have been addressed in Brooks, 908 P.2d 856. In Brooks, this Court held that an appellate court has "the authority under rule 22(e) to address a claim of an illegal sentence for the first time on appeal." Id. Nothing in Samora II expands on Brooks to allow an appellate court to assume jurisdiction based solely on Rule 22(e). To the extent the state is correct that allowing an appellate court to address a sentencing claim raised for the first time on appeal under Rule 22(e) also creates appellate jurisdiction without requiring a timely notice of appeal, that determination was already made in Brooks and is not properly before the Court on certiorari in this case.

Government of the V.I. v. Martinez, 239 F.3d 293, 299 n.3 (3d Cir. 2001); State v. McNellis, 546 A.2d 292, 305-06 (Conn. App. Ct. 1988); State v. Sieler, 554 N.W.2d 477, 479 (S.D. 1996)). A copy of Headley is in Addendum G.

As the Court of Appeals noted in Headley, many jurisdictions have recognized this distinction between an illegal sentence and a sentence that was imposed in an illegal manner. Headley, 2002 UT App 58 n. 2, citing *inter alia* Martinez, 239 F.3d at 299 n. 3; McNellis, 546 A.2d at 305-06. In Martinez, the Court articulated the distinction between an illegal sentence and a sentence imposed in an illegal manner as follows:

"Illegal sentences are essentially only those which exceed the relevant statutory maximum limits or violate double jeopardy or are ambiguous or internally contradictory. Sentences imposed in an illegal manner are within the relevant statutory limits but are imposed in a way which violates defendant's right, under Rule 32, to be addressed personally at sentencing or to speak in mitigation of punishment, or his statutory right to be asked about his prior convictions, in a proceeding to impose an enhanced sentence in a narcotics convictions or his right to be sentenced by a judge relying on accurate information or considerations solely in the record . . . ."

Martinez, 239 F.3d at 299 n.3 (quoting *inter alia* 8A J. Moore, Moore's Federal Practice P 35.03[2] (2d ed. 1987)).

The Court made a similar distinction between "illegal sentences" and sentences that are imposed in an illegal manner" in McNellis, 546 A.2d at 305-06.

An "illegal sentence" is essentially one which either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory.

. . .

. . . Sentences imposed in an illegal manner have been defined as being "within the relevant statutory limits but . . . imposed in a way which violates defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right that the government keep its plea agreement promises . . . ."

Id. (further citation omitted).<sup>3</sup>

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<sup>3</sup> Petitioner claims that the interpretation of the phrase *sentence imposed in an illegal manner* by other jurisdictions should be viewed with caution because many other rules containing that language have a time limit on the ability to review a sentence imposed in an illegal manner whereas Utah does not. Pet. Brf. at 12 n. 7. While the state is correct that many other jurisdictions limit the period of time in which a defendant can challenge a sentence imposed in an illegal manner, such limitation does not impact on the meaning of the phrase.

Additionally, in most states, the time period for attacking a sentence that was imposed in an illegal manner extends beyond the first right of appeal. See e.g. Ark. Code Ann. § 6-90-111 (West 2001) (sentence imposed in an illegal manner can be corrected within sixty days after receipt of mandate following appeal); S.D. Codified Laws § 23A-31-1 (West 2002)(court may correct sentence imposed in an illegal manner within 120 days after receipt of remittitur following appeal). Indeed, the Arkansas and South Dakota statutes relied on by the state allow a defendant to challenge a sentence imposed in an illegal manner until a period of time after the case has been remitted from appeal. Id.

This means that in both those states and many others, a defendant can challenge a sentence imposed in an illegal manner while the case is on appeal even if the issue was not raised below. In other words, review of the illegally imposed sentence would be available in the procedural context of this case. Because statutes in other states also allow for a lengthy period of time in which to challenge a sentence imposed in an illegal manner, the state's claim that the more limited time frame for challenging an illegally imposed sentence in those states somehow changes the meaning of the term is not persuasive.

The definition of *sentence imposed in an illegal manner* used by other jurisdictions is the only logical meaning for that phrase; by its plain language, this phrase refers to the method by which the sentence is imposed. The state has not offered a plausible definition other than the one embraced by other jurisdictions which is apparent from the plain language of the rule.



The definition for *sentences imposed in an illegal manner* employed by other courts and Moore's Federal Practice is consistent with the plain language of Rule 22(e). Utah's rule, by its very language, allows a challenge not only to "illegal sentences," but also to "sentence[s] imposed in an illegal manner." The use of this distinct terminology, "sentence imposed in an illegal manner," necessarily indicates that defendants can use Rule 22(e) to challenge more than just sentences that do not comply with the statutory authorization. In fact, the word "manner" refers to "a way or method in which something is done or happens; mode or fashion of procedure." Webster's New World College Dictionary 875 (4<sup>th</sup> ed. 1999). The plain language of Rule 22(e) tells us then that a court can correct a sentence which is imposed by an illegal method or procedure at any time.

A sentence which is imposed in violation of Rule 22(a) because the defendant or defense counsel is not afforded the opportunity to address information relevant to sentencing is a sentence imposed using an illegal method, i.e. in an illegal manner. See generally Headley, 2002 UT App 58 n. 2 (recognizing that "[o]ther jurisdictions have defined sentences imposed in an illegal manner as those that are within statutory and jurisdictional limits, but violate a defendant's rights"). A sentence imposed in violation of due process because the court improperly sentenced the defendant *in absentia* or because the sentencing court did not rely on relevant and reliable information is likewise a sentence imposed in an illegal manner. See generally id. Such an approach is consistent with the plain language of the rule as well as the definition employed by other

jurisdictions.<sup>4</sup>

Because the plain language of Rule 22(e) makes a distinction between illegal sentences and sentences imposed in an illegal manner, the state's claim that the Court of Appeals created a new class of sentences is incorrect. The rule itself acknowledges two types of unlawful sentences - - those that are illegal because they are not statutorily authorized and those that are imposed in an illegal manner. Moreover, the rule allows

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<sup>4</sup> The state devotes much of its brief to a discussion of what it calls "ordinary sentencing error" as opposed to "Rule 22(e) sentencing error," and suggests that the Court of Appeals has improperly expanded the scope of "Rule 22(e) sentencing error" in a variety of cases. Pet. Brf. at 6-20. The issue on certiorari in this case is not whether the Court of Appeals misinterpreted the reach of Rule 22(e) in other cases, but whether the Court correctly concluded that if Rule 22(e) is used on appeal to reach a sentence imposed in an illegal manner, the limitations of due process and section 76-3-405 preclude imposition of a harsher sentence on remand.

Rule 22(e) is a means by which the court is allowed to proceed in a case. It allows an appellate court to vacate an illegal sentence or a sentence that was imposed in an illegal manner when the case is before it on appeal. In either case, the rule allows a court to correct an error in sentencing that is of sufficient magnitude that the interests of society as well as the interests of the defendant are served by vacating the sentence.

The state also suggests, without any support, that the only sentences that should be reviewed under Rule 22(e) are those which are apparent without a review of the record. Pet. Brf. at 11-12 and n. 6 & 7. While this Court recognized in State v. Telford, 2002 UT 51, ¶5, 48 P.3d 228 that "[t]he purpose of rule 22(e) is to allow the correction of manifestly illegal sentences," it did not define manifestly illegal sentences as those that are apparent without reviewing the record. A manifestly illegal sentence is simply a sentence that is plainly, clearly, or evidently illegal. See Webster's New College Dictionary 875. Nothing in the rule or this Court's opinions suggest that the reach of Rule 22(e) is limited to sentences whose illegality is apparent without reviewing the record. Indeed, a review of the record is necessary to determine whether an illegal sentence that is not statutorily authorized was imposed, as was the case in Babbell II. Moreover, a review of the record would be necessary in almost any case where there is a claim that the sentence was imposed in an illegal manner. Because the plain language of the rule applies to sentences imposed in an illegal manner, the state's claim that review of the record is not allowed under the rule is not persuasive.

either type of unlawful sentence to be vacated at any time. While sentences that are not authorized by statute are void because the court did not have the authority to enter them, sentences imposed in an illegal manner are, on their face lawful, but can be vacated if a court determines that the sentence was imposed in an illegal manner.

(b) Babbell II Does Not Resolve the Issue of Whether a Trial Judge Can Impose a Harsher Sentence After a Defendant Successfully Appeals a Sentence that Was Imposed in an Illegal Manner.

Although the state engages in a lengthy discussion of sentencing error as well the state's perceived concern that the Court of Appeals has extended the reach of Rule 22(e), its argument on certiorari is based primarily on Babbell II, 813 P.2d 86. As the Court of Appeals pointed out, however, the state's reliance on Babbell II "is misplaced." Samora II, 2002 UT App 384, ¶15. Babbell II does not resolve the issue in this case because it did not involve circumstances where a defendant successfully appealed a sentence that the trial court had imposed in an illegal manner.

Babbell originally appealed his conviction on grounds unrelated to his sentence. See Babbell I, 770 P.2d 987. During oral argument in the original appeal, the state brought up the fact that Babbell had not been sentenced as prescribed by statute. Id. at 993-94. The state pointed out and this Court agreed that the statute required the imposition of a minimum mandatory prison sentence. Id. Because the sentences that had been imposed were not authorized by statute, this Court vacated the sentences. Id. at 994. On remand, the trial court imposed the statutorily authorized, and harsher,

minimum mandatory sentences. Babbell II, 813 P.2d at 86.

After the harsher sentences were imposed on remand, Babbell again appealed, arguing that due process and Utah Code Ann. § 76-3-405 prohibited the imposition of a harsher sentence. Babbell II, 813 P.2d at 87. This Court disagreed, pointing out in part that the initial sentences were illegal sentences because they were not authorized by statute and that the illegal sentences were therefore void. Id. at 87-88. The characterization of illegal sentences as void and therefore not subject to due process and section 76-3-504 limitations apparently planted the seed for the state's current argument that a sentence imposed in an illegal manner is also void and not subject to statutory and due process limitations. A complete reading of Babbell II, section 76-3-405, case law outlining the due process limitation on increased resentencing following a successful appeal, and common sense demonstrate that the state is incorrect, and that when a defendant successfully appeals a sentence imposed in an illegal manner and relies on Rule 22(e) to reach the issue, the trial court is precluded by constitutional and statutory protections from imposing a harsher sentence at resentencing.

In Babbell II, this Court recognized the due process and section 76-3-405 limitations on imposition of a harsher sentence after a defendant successfully appeals a conviction or sentence. This Court stated that "[w]hen a criminal defendant *successfully appeals* a conviction or *sentence*, § 76-3-405 prohibits imposition of a new and harsher sentence based on the same conduct." Babbell II, 813 P.2d at 87 (emphasis added). This

Court also indicated that prohibiting the imposition of a harsher sentence after a defendant successfully appeals "is appropriate because federal 'due process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new [sentencing].'" Id. (quoting Pearce, 395 U.S. at 725). This Court further explained that federal due process and the importance of the state constitutional right of criminal defendants to appeal require that a harsher sentence not be imposed following a reversal on appeal.

In *State v. Sorenson*, 639 P.2d 179, 181 (Utah 1981), this Court held that federal due process prohibits a harsher sentence from being imposed in a second trial for the same offense after a reversal of the first conviction. That constitutional policy is particularly compelling in this state because there are two explicit state constitutional rights of a criminal defendant to appeal, Article I, section 12 of the Declaration of Rights in the Utah Constitution and Article VIII, section 5. A defendant's constitutional right to appeal is further protected by § 76-3-405. The purpose behind these provisions is to prevent the chilling effect on the constitutional right to appeal which the possibility of a harsher sentence would have on a defendant who might be able to demonstrate reversible error in his conviction. This Court has stated:

The purpose of an appeal is to promote justice by ferreting out erroneous judgments. The purpose is not promoted by imposing on a defendant who demonstrates the error of his conviction the risk that he may be penalized with a harsher sentence for having done so. An erroneous judgment of convictions is as much an affront to society's interest in the fair administration of justice as it is an individual's rights.

*Chess v. Smith*, 617 P. 2d 341, 343 (Utah 1980).

Babbell II, 813 P.2d at 88.

Although imposition of a harsher sentence after a defendant successfully appeals his sentence violates due process and section 76-3-405, it did not violate due process or

the statute in Babbell II because the defendant did not successfully appeal his sentence. Instead, this Court recognized while the case was on appeal that an illegal sentence which was more lenient than that which was mandated by statute had been imposed, and vacated that illegal sentence. This Court reasoned in Babbell II that section 76-3-405 and due process were not violated by the imposition of a harsher sentence because there was no chilling effect on the right to appeal and the illegal sentence was not authorized by statute and was therefore void. Babbell II, 813 P.2d at 88.

Nevertheless, the principles underlying *Sorenson*, *Chess*, *Pearce*, and § 76-3-405 have no application in this case. The correction of an illegal sentence stands on a different footing from the correction of an error of conviction. First, a defendant is not likely to appeal a sentence that is unlawfully lenient, and there is, therefore, minimal chilling effect on the right to appeal.

Second, § 77-35-22(e) specifically provides that because an illegal sentence is void, a trial court may correct an illegal sentence at any time.

Id.

The facts in Samora II are substantially different from those in Babbell II. First, Babbell did not *successfully appeal* in the original appeal; instead, this Court discovered while the case was on appeal that the sentence which had been imposed had no legal effect because it was not authorized by statute. By contrast, Mr. Samora successfully appealed the manner in which his sentence was imposed and received a new sentencing hearing because his sentence was imposed in an illegal manner. Second, the sentence in Babbell II was illegal and void because it was not a sentence that the trial court was authorized by statute to impose. The sentence had no legal effect and this Court

therefore correctly concluded that it was a void sentence because the trial judge did not have the authority to impose it. By contrast, the sentence imposed in this case was authorized by statute and the sentencing court had the power to impose it; the problem with the original sentence in this case was that the judge used an unlawful manner or method in imposing sentence.

Third, and perhaps most importantly, allowing a harsher sentence in this case would create a chilling effect on the right to appeal and allow vindictiveness in resentencing after a defendant prevails on appeal whereas none of the purposes served by the due process and section 76-3-405 limitations on resentencing would have been served by requiring the trial court to not impose the statutorily required, albeit harsher, sentence in Babbell II. See Babbell II, 813 P.2d at 88. If the trial court is permitted to impose a harsher sentence after a criminal defendant successfully appeals a sentence that was imposed in an unlawful manner, defendants like Mr. Samora who are sentenced in violation of due process and Rule 22(a) will not appeal for fear the trial judge will impose an even harsher sentence following a successful appeal. Sentencing courts could ignore the constitutional and statutory requirements for a full and fair sentencing hearing, but defendants would not appeal for fear the judge would act vindictively and impose a harsher sentence following a successful appeal. The appellate purpose of ferreting out erroneous judgments in which sentences were imposed in an illegal manner would be undermined if judges were given free rein to impose a harsher sentence after the

defendant successfully appeals the manner in which the sentence is imposed. Due process and section 76-3-405 therefore prohibit the imposition of a harsher sentence after a defendant successfully appeals the unlawful manner in which the sentence was imposed.

In addition to disregarding the due process and statutory protections, the state also disregards this Court's recognition in Babbell II that resentencing more harshly might violate due process even in circumstances where the original sentence was void because it was not authorized by statute. Babbell II, 813 P.2d at 88. After holding in Babbell II that due process and section 76-3-405 did not preclude the imposition of a harsher sentence because the original illegal sentence was void, this Court stated, "[n]evertheless, we acknowledge that 'there may be circumstances under which even a corrected illegal sentence may be fundamentally unfair, thus violative of Due Process.'" Id. (quoting State v. Delmondo, 696 P.2d 344, 346 (Ha. 1985)). It would be fundamentally unfair to allow a harsher sentence in this case after Mr. Samora was forced to successfully appeal his original sentence in order to obtain a full and fair sentencing hearing.

(c) The Court of Appeals Correctly Held that Due Process and Section 76-3-405 Preclude the Imposition of a Harsher Sentence After a Defendant Successfully Appeals the Original Sentence that Was Imposed in an Illegal Manner.

In the present case, the Court of Appeals recognized that Babbell II was not applicable and that due process and section 76-3-405 required that the trial court not impose a harsher sentence after Mr. Samora successfully appealed his original sentence.



Samora II, 2002 UT App 384, ¶16. The Court of Appeals stated:

In *Babbell [II]*, the defendant was sentenced to a term less than the applicable statute's minimum mandatory requirements. 813 P.2d at 86. The supreme court concluded that the principles underlying *Pearce*, *Sorenson*, *Chess*, and section 76-3-405 did not apply because a defendant is unlikely to appeal a sentence that is unlawfully lenient, so there is a "minimal chilling effect on the right to appeal." 813 P.2d at 88. Unlike *Babbell [II]*, Defendant's resentencing did not result from an original sentence contrary to statutory minimum mandatory requirements. Rather, Defendant's original sentence was vacated because he was sentenced in absentia. The sentence itself was not illegal, but the manner in which it was imposed was contrary to the law. Furthermore, allowing a harsher sentence when the original sentence was imposed in an illegal manner would have a "chilling effect on the right to appeal," *id.*, and impair the Utah Constitution's guaranty of the right to appeal. *See Sorenson*, 639 P.2d at 181. Therefore, because *Babbell [II]* is not applicable, we conclude that the due process discussion in *Pearce*, *Sorenson*, and *Chess* require us to apply the presumption of vindictiveness.

Samora II, 2002 UT App 384, ¶16. This decision is consistent with the language of Rule 22(e) and section 76-3-405 and furthers the policy behind the due process and statutory limitations on resentencing following a successful appeal.

Nothing in the language of Rule 22(e) or section 76-3-405 suggests that when a defendant successfully appeals the manner in which his sentence is imposed utilizing Rule 22(e) to reach the issue, the trial court is free to impose a harsher sentence. In fact, the state fails to point to any language in either the rule or the statute that supports its claim that after a sentence that was imposed in an illegal manner is vacated on appeal under Rule 22(e), the sentencing court is free to impose an even harsher sentence.

Moreover, precluding imposition of harsher sentence after a defendant successfully appeals under Rule 22(e) the manner in which sentence was imposed, furthers the goal of preserving the right to appeal. It also ensures that defendants receive full and fair sentencing hearings where trial courts follow due process and statutory requirements. Because due process and section 76-3-405 preclude the imposition of a harsher sentence when a defendant is forced to appeal in order to receive a fair hearing, defendants who are sentenced in an illegal manner will not be afraid to appeal and ask for a full and fair sentencing hearing.

The state complains that allowing a defendant to challenge, under Rule 22(e), a sentence imposed in an illegal manner, but imposing the section 76-3-405 and due process limitations at resentencing "is the best of all possible worlds for the defendant." Pet. Brf. at 13. Actually, it is the best approach for fairness and the integrity of the system. Not just the defendant, but the state as well, should be concerned that trial courts comply with due process and relevant statutes and rules when sentencing criminal defendants. When a trial court imposes a sentence in an illegal manner, justice and fairness require that the defendant be able to challenge the sentence and ask for a fair hearing without fear of reprisal. Rule 22(e) recognizes the importance of ensuring that sentences are imposed in a lawful manner by allowing the correction of a sentence imposed in an illegal manner at any time. The policy behind the due process and section 76-3-405 limitations on resentencing after a defendant successfully appeals is well served

by applying those limitations in cases where a defendant successfully appeals the manner in which his sentence is imposed, and utilizes Rule 22(e) as the means for reaching that issue.

In this case, where Mr. Samora successfully appealed his initial sentence claiming that it was imposed in violation of due process and Rule 22(a), allowing imposition of a harsher sentence following the successful appeal would allow the type of vindictiveness and fear of retaliation which is the root of the statutory and due process concern. It would discourage defendants from appealing sentences which are imposed in an illegal manner, undermine justice and fairness by allowing sentences imposed in an illegal manner to be carried out without challenge, and serve as "an affront to society's interest in the fair administration of justice" as well as Mr. Samora's rights. See Babbell II, 813 P.2d at 88 (quoting Chess, 617 P.2d at 343). Babbell II does not allow for the imposition of a harsher sentence after Mr. Samora successfully appealed the illegal manner in which the initial sentence was imposed, and due process and section 76-3-405 mandate that a harsher sentence could not be imposed.

Moreover, Rule 22(e) recognizes the importance of correcting sentences imposed in an illegal manner by allowing them to be corrected at any time. Allowing a trial court to impose a harsher sentence after a defendant utilizes Rule 22(e) to correct a sentence imposed in an illegal manner would undercut the efficacy of Rule 22(e).

The Court of Appeals correctly concluded that the trial court violated due process and section 76-3-405 in imposing a harsher sentence after Mr. Samora successfully appealed the manner in which the original sentence was imposed. Mr. Samora respectfully requests that this Court uphold the decision of the Court of Appeals.

**CONCLUSION**

Respondent Manuel Samora respectfully requests that this Court uphold the decision of the Court of Appeals and vacate his sentence.

SUBMITTED this 31<sup>st</sup> day of July, 2003.



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JOAN C. WATT

Attorney for Defendant/Respondent

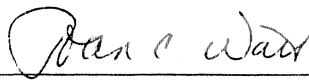
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JOHN K. WEST

Attorney for Defendant/Respondent

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be hand-delivered the original and nine copies of the foregoing to the Utah Supreme Court, 450 South State, 5th Floor, P. O. Box 140210, Salt Lake City, Utah 84114-0210, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 31<sup>st</sup> day of July, 2003.

  
\_\_\_\_\_  
JOAN C. WATT

DELIVERED to the Utah Supreme Court and the Utah Attorney General's Office as indicated above this \_\_\_\_\_ day of July, 2003.

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## ADDENDA

## ADDENDUM A

This opinion is subject to revision before  
publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

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State of Utah,  
Plaintiff and Appellee,

v.

Manuel Ernesto Samora,  
Defendant and Appellant.

OPINION  
(For Official Publication)

Case No. 20010988-CA

FILED  
November 15, 2002

2002 UT App 384

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Third District, **Salt Lake** Department  
The Honorable J. Dennis Frederick

Attorneys:

Joan C. Watt and John K. West, Salt Lake City, for Appellant  
Mark L. Shurtleff and Jeanne B. Inouye, Salt Lake City, for Appellee

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Before Judges Jackson, Bench, and Greenwood.

GREENWOOD, Judge:

¶1 Manuel Ernesto Samora (Defendant) appeals from a sentence for attempted joyriding with intent to temporarily deprive owner, a class A misdemeanor, in violation of Utah Code Ann. § 41-1a-1314 (1998) and Utah Code Ann. § 76-4-101 (1999). Defendant argues that the trial judge erred in imposing a harsher sentence following reversal of his original sentence on appeal. We vacate Defendant's sentence and remand.

BACKGROUND

¶2 On August 8, 2000, Defendant pleaded guilty to attempted unlawful control of a motor vehicle with intent to temporarily deprive owner. As part of his plea agreement with the State, Defendant agreed to pay restitution to the victim. The trial court accepted Defendant's guilty plea and agreed to release him on his own recognizance pending sentencing. The trial court set sentencing for September 22, 2000, in front of a different trial judge. When Defendant failed to appear for his September 22 sentencing, the trial court sentenced him in absentia to the statutory maximum one-year sentence, imposed a fine of \$2500, a surcharge, and attorney fees. The trial court did not impose restitution.



¶3 Defendant appealed his sentence in absentia, claiming it violated due process and Rule 22(a) of the Utah Rules of Criminal Procedure. On September 7, 2001, this court in a per curiam opinion vacated Defendant's sentence and remanded his case for resentencing in accordance with State v. Wanosik, 2001 UT App 241, 31 P 3d 615, cert. granted, 42 P 3d 951 (Utah 2002) <sup>(1)</sup>

¶4 On November 16, 2001, Defendant appeared for resentencing before the judge who previously sentenced him. During resentencing, defense counsel requested that the trial court waive or substantially reduce Defendant's fine so Defendant could pay the restitution that he originally agreed to as part of the plea negotiation. Defense counsel also requested that Defendant be granted credit for the six months he had served on his sentence awaiting the original appellate disposition.

¶5 After taking testimony regarding the restitution amount owing, the trial court resentenced Defendant to the maximum one-year jail term, denying Defendant good-time credit for the six months he had served. The court again imposed the maximum \$2500 fine, a surcharge, and attorney fees. In addition, the court ordered that Defendant pay \$744.80 in restitution.

¶6 Defendant filed a Motion to Reconsider Sentence asking the trial court to reconsider its denial of credit for time served. The trial court granted Defendant's Motion to Reconsider and gave him credit for the time he had served.

#### ISSUE AND STANDARD OF REVIEW

¶7 Defendant claims the trial court erred by imposing restitution at resentencing when restitution was not imposed as part of Defendant's original sentence. Because sentencing errors involve questions of law, we review for correctness. See State v. Kenison, 2000 UT App 322, ¶7, 14 P 3d 129.

#### ANALYSIS

¶8 Defendant argues that the trial court erred when it imposed restitution at resentencing without waiving or substantially reducing the fine Defendant owed. He contends that due process and Utah Code Ann. § 76-3-405 (1999), preclude the imposition of a harsher sentence after a case is reversed on appeal. The State argues that Defendant invited any sentencing error when he declared his obligation to pay restitution. Alternatively, the State asserts that the trial court may increase the penalties upon resentencing when the original sentence was illegal or is based on facts not known to the court at the time of the original sentencing <sup>(2)</sup>

¶9 In North Carolina v. Pearce, 395 U.S. 711, 725, 89 S. Ct. 2072, 2080 (1969), the Supreme Court held that when resentencing a defendant, due process prevents the sentencing judge from increasing the sentence when that increase is motivated by vindictiveness. To free defendants from the apprehension of such a retaliatory motivation, the Supreme Court held that "whenever a judge imposes a more severe sentence upon a defendant," the reasons must affirmatively appear on the record and "be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." Id. at 766, 89 S. Ct. at 2081. But see Texas v. McCullough, 475 U.S. 140, 142, 106 S. Ct. 976, 980-81 (1986) (stating that language "[r]estricting justifications for a sentence increase to only 'events that occurred subsequent to the original proceeding'" was not "intended to describe exhaustively all of the possible circumstances in which a sentence increase could be justified.")

¶10 The Utah Code also addresses limitations on resentencing, as follows:

(1) Where a conviction or sentence has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied.

(2) This section does not apply when

(a) the increased sentence is based on facts which were not known to the court at the

time of the original sentence, and the court affirmatively places on the record the facts which provide the basis for the increased sentence; . . . .

Utah Code Ann. § 76-3-405.

¶11 In State v. Sorensen, 639 P.2d 179, 180 (Utah 1981), the supreme court discussed the requirements of due process and section 76-3-405 in relation to resentencing. The supreme court held that section 76-3-405

prevents the Utah constitutional right to appeal (Article VIII, § 9) from being impaired "by imposing on a defendant who demonstrates the error of his conviction the risk that he may be penalized with a harsher sentence for having done so."

Id. (quoting Chess v. Smith, 617 P.2d 341, 343 (Utah 1980)).

In the context of the due process requirement of North Carolina v. Pearce, [395 U.S. 711, 89 S. Ct. 2072], which seeks to assure that there is no chilling or deterring of the criminal defendant's exercise of his basic constitutional right to appeal, and in light of the Utah constitutional constraint against impairing the right to appeal, as articulated in Chess v. Smith, [617 P.2d 341], we think the meaning of our statutory prohibition against a "more severe" second sentence is clear. The second sentence cannot exceed the first in appearance or effect, in the number of its elements, U.C.A., 1953, § 76-3-201, or in their magnitude.

Sorensen, 639 P.2d at 181 (alterations in original).

¶12 Our supreme court has also observed that section 76-3-405 is "more stringent than the due process protection [and] 'allows for no exceptions.'" State v. Bakalov, 1999 UT 45, ¶73, 979 P.2d 799 (quoting Sorensen, 639 P.2d at 180). Although the State agrees that as a general rule a sentence imposed after a successful appeal cannot be more severe than the prior sentence, it argues that Defendant's case is different because he invited any error by volunteering that he owed restitution.

¶13 Defendant acknowledges he did not argue at resentencing that the trial court was precluded from imposing a harsher sentence on resentencing. However, Defendant asserts plain error on appeal. The State counters, and our dissenting colleague agrees, that Defendant invited error by initiating the discussion of restitution and acknowledging that it was owed. Accordingly, the State asserts that a plain error analysis is not available. See State v. Perdue, 813 P.2d 1201, 1206 (Utah Ct. App. 1991) (stating invited error defeats claim of plain error). We have two initial responses. First, as noted in Wanosik, rule 22(e) permits this court to consider whether a defendant was illegally sentenced "even if the issue is raised for the first time on appeal." State v. Wanosik, 2001 UT App 241, ¶28 n.11, 31 P.3d 615, cert. granted, 42 P.3d 951 (Utah 2002) (quoting State v. Brooks, 908 P.2d 856, 860 (Utah 1995)). Second, the colloquy between the trial court and Defendant's counsel lacked sufficient clarity to construe it as an invitation or stipulation for the trial court to violate section 76-3-405.<sup>(3)</sup>

¶14 We acknowledge that Defendant did not provide a plain error analysis in his brief, alluding to it only in the standard of review section, perhaps relying on the proposition stated in Wanosik and Brooks, that the issue did not need to be preserved in the trial court. As noted in the dissenting opinion, plain error will be found only if the appellant establishes that "(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful. . . ." State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993). The third factor is clearly established because Defendant received a more harsh sentence on resentencing. We next examine the first factor, whether error occurred, because that analysis is necessary to a plain error evaluation and also necessary if we have jurisdiction under Wanosik and Brooks. We note that this issue is addressed in Defendant's brief.

¶15 We begin our analysis by determining whether the presumption of vindictiveness as described in Pearce is applicable. See Pearce, 395 U.S. at 725, 89 S. Ct. at 2080; State v. Babbel, 813 P.2d 86, 87 (Utah 1991). The State argues that the principles underlying Pearce are not applicable in this case because Defendant's original sentence was illegal, and under Babbel, id. at 88, an illegal sentence is void and not subject to the sentence protections articulated in Pearce, Sorensen, Chess, and section 76-3-405. However, we find the State's reliance on Babbel to be misplaced.

¶16 In Babbel, the defendant was sentenced to a term less than the applicable statute's minimum mandatory requirements 819 P 2d at 86 The supreme court concluded that the principles underlying Pearce, Sorensen, Chess, and section 76-3-405 did not apply because a defendant is unlikely to appeal a sentence that is unlawfully lenient, so there is a "minimal chilling effect on the right to appeal " Id at 88 Unlike Babbel, Defendant's resentencing did not result from an original sentence contrary to statutory minimum mandatory requirements Rather, Defendant's original sentence was vacated because he was sentenced in absentia The sentence itself was not illegal, but the manner in which it was imposed was contrary to law Furthermore, allowing a harsher sentence when the original sentence was imposed in an illegal manner would have a "chilling effect on the right to appeal," id, and impair the Utah Constitution's guaranty of the right to appeal See Sorenson, 639 P 2d at 181 Therefore, because Babbel is not applicable, we conclude that the due process discussion in Pearce, Sorensen, and Chess require us to apply a presumption of vindictiveness Accordingly, we next consider whether the presumption is successfully rebutted <sup>(4)</sup>

¶17 During resentencing the following colloquy took place

DEFENSE COUNSEL [Mr Samora] would like the Court to be aware of some of the things that he's been doing while he's been incarcerated He served two months in jail before he was sentenced originally on this case and then he served an additional approximately four months, I think, since--

MR SAMORA Six Six months

DEFENSE COUNSEL Six months And it would be--

THE COURT While you were pursuing the appeal?

DEFENSE COUNSEL Yes, your Honor

THE COURT Yeah Well, I mean, the point is, I guess, made

DEFENSE COUNSEL [I]t would be my request on behalf of Mr Samora that the Court do a couple of things One, that the Court would waive the fine There is some restitution owing that was part of the negotiation in this case to the victim Mr Samora and the victim in the case had a fairly long-term relationship before this all happened and there was, as part of the negotiation, he's to pay some restitution with respect to that

We'd ask the Court to--to waive or at least to reduce the fine substantially and--and ask that the Court give him credit for time served on this case

THE COURT All right Thank you

¶18 After receiving the victim's testimony regarding the amount of restitution owed, the trial judge imposed the maximum one-year sentence, \$2500 fine, a surcharge, and attorney fees The court also ordered Defendant to pay \$744 80 in restitution, without any reduction in the fine, as Defendant had requested The trial judge initially denied Defendant's request for credit for the six months he had already served on his one-year sentence, but relented after Defendant filed his Motion to Reconsider Sentence

¶19 The State argues that although Defendant "may have hoped for a reduction in his fine," the record does not indicate that his agreement to pay restitution was conditioned on such a reduction However, after reading the sentencing proceeding transcript in context, it is apparent that Defendant was asking the trial court to waive or substantially reduce his fine so that Defendant could instead pay restitution It is unreasonable to believe that Defendant volunteered to assume responsibility for restitution, which if imposed would substantially increase the monetary amount of Defendant's sentence, on the mere hope that his fine would be waived or reduced Furthermore, given extant case law and section 76-3-405, Defendant was not required to submit to a restitution order as part of resentencing, nor was the trial court empowered to order the same Given the record we have before us, we cannot conclude that the presumption of vindictiveness has been rebutted Therefore, error

occurred because Defendant received a harsher sentence after exercising his constitutional right to appeal his original sentence.

¶20 The State, however, also argues that Defendant's harsher sentence was appropriate under Utah Code Ann. § 76-3-405(2)(a), which allows for an increased sentence when it is "based on facts which were not known to the court at the time of the original sentence." The State argues that because the trial judge did not review the record, which included Defendant's obligation to pay restitution, before originally sentencing Defendant, the prohibition against a harsher sentence does not apply. We disagree.

¶21 The record discloses that restitution was discussed at Defendant's plea hearing. In addition, the record includes the "Statement of Defendant, Certificate of Counsel and Order," signed by Defendant, in which he agrees to pay restitution. The State cannot claim that the facts regarding restitution were unknown at the time of the original sentencing because the trial judge did not review the record before sentencing Defendant. A trial judge, like every other party to a proceeding, is charged with knowledge of what is in the record. Therefore, the trial judge's failure to familiarize himself with the record in this case does not satisfy the lack of knowledge requirement found in section 76-3-405. Furthermore, as noted in the per curiam opinion vacating Defendant's original sentence, the trial court at the original sentencing did not provide an opportunity for Defendant's counsel or the State to provide any information relevant to sentencing. See *State v. Samora*, 2001 UT App 266 (per curiam).

¶22 Having concluded that error occurred, we now turn to whether **"the error should have been obvious to the trial court."** *Dunn*, 850 P.2d at 1208. Section 76-3-405, federal case law, *Bakalov*, and *Sorenson* clearly prohibit a harsher sentence on resentencing absent specific circumstances. The trial court did not address nor specify any basis for deviating from that mandate. Therefore, the error should have been recognized by the trial court.

## CONCLUSION

¶23 We conclude that we have jurisdiction in this **case despite Defendant's failure** to preserve the issues before the trial court because the trial court illegally imposed sentence in the first sentencing. Alternatively, there was plain error in imposing sentence. Given the record before us, we conclude that the presumption of vindictiveness or retaliation has not been rebutted and Defendant received a harsher sentence on resentencing in derogation of section 76-3-405 and principles of due process. Therefore, we reverse and remand for sentencing in accordance with this opinion. At resentencing, the restitution order must be eliminated, or at Defendant's option and with the trial court's agreement, the fine may be reduced by the amount of restitution.

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Pamela T. Greenwood, Judge

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¶24 I CONCUR:

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Norman H. Jackson,  
Presiding Judge

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BENCH, Judge (dissenting):

¶25 I see this case much differently than do my colleagues.

¶26 Judge Robin W. Reese took Defendant's plea. In that proceeding, **Defendant agreed to pay restitution** to the victim, his former girlfriend. Sentencing was then scheduled before Judge J. Dennis Frederick. When Defendant failed to appear for sentencing, Judge Frederick sentenced him in absentia. No sentencing information was

presented at that proceeding, and Judge Frederick imposed the maximum jail time and fine. On the first appeal, this court reversed Defendant's sentence in accordance with State v. Wanosik, 2001 UT App 241, 31 P 3d 615, cert. granted, 42 P 3d 951 (Utah 2002). We then remanded the case for resentencing.

¶27 At the resentencing hearing, Defendant appeared and affirmatively asserted that, under his plea agreement, he owed restitution. He said he owed about \$900, maybe "a little higher," although the victim testified that \$744.80 would cover her losses. Judge Frederick ordered Defendant to pay the lesser sum in restitution, plus the maximum jail time and fine. Apparently, Defendant had hoped that he would be ordered to pay just the restitution and no fine. Defendant's attorney made the following statement to the court:

It would be my request on behalf of Mr. Samora that the Court do a couple of things. One, that the Court would waive the fine. There is some restitution owing that was part of the negotiation in this case to the victim. They've--Mr. Samora and the victim in the case had a fairly long-term relationship before this all happened and there was, as a part of the negotiation, [an agreement] to pay some restitution with respect to that.

We'd ask the Court to--to waive or at least to reduce the fine substantially and--and ask that the Court give him credit for time served on this case.

¶28 Defendant never claimed below that the imposition of restitution, in addition to the fine, would violate due process or Utah Code Ann. § 76-3-405 (1999). Because Defendant did not raise this issue below, we are precluded from addressing it unless Defendant can demonstrate that exceptional circumstances exist or plain error occurred. See State v. Holgate, 2000 UT 74 ¶11, 10 P 3d 346. On appeal, Defendant mentions plain error in reciting what he believes to be the applicable standard of review, but does not even purport to demonstrate how the trial court plainly erred. We, therefore, are precluded from addressing the issue.

¶29 We would be precluded from addressing the issue even if Defendant had articulated a plain error argument on appeal. "To establish plain error, an appellant must demonstrate that '(i) an error exists, (ii) the error should have been obvious to the trial court, and (iii) the error is harmful.'" State v. Pecht, 2002 UT 41, ¶18, 48 P 3d 931 (quoting State v. Dunn, 850 P 2d 1201, 1208 (Utah 1993)). Plain error, however, can never be urged when the appellant affirmatively invites the court's ruling. See State v. Perdue, 813 P 2d 1201, 1206 (Utah Ct. App. 1991) (stating that "where invited error butts up against manifest injustice [or plain error], the invited error rule prevails"). "The doctrine of invited error 'prohibits a party from setting up an error at trial and then complaining of it on appeal.'" Id. at 1205 (citation omitted). Otherwise, a criminal defendant could invite prejudicial error and "implant it in the record as a form of appellate insurance." State v. Parsons, 781 P 2d 1275, 1285 (Utah 1989). In this case, Defendant affirmatively raised the issue of restitution and agreed that restitution was owing. He did not claim that, if restitution were ordered, he had a due process or statutory entitlement to a reduction in the fine. Given how he invited the court to impose restitution, Defendant is now in no position to challenge it on appeal. See Perdue, 813 P 2d at 1205.

¶30 Even if we could properly reach the merits of Defendant's contention on appeal, the argument fails because the first sentence had no legal effect. At resentencing, the trial court was therefore not limited by the terms of the first sentence. See State v. Babbel, 813 P 2d 86, 88 (Utah 1991) (stating that "[t]he rule followed by most jurisdictions is that an unlawful sentence is of no legal effect, allowing the court to correct the sentence by imposing lawful terms at any time the illegality is discovered, regardless of whether the correction involves an increase") (quoting Annotation, Power of Court to Increase Severity of Unlawful Sentence--Modern Status, 28 A L R 4th 147, 152 (1984)).

¶31 The main opinion is wrong in trying to distinguish this case from Babbel. In Babbel, the Utah Supreme Court cited the statute that preceded rule 22(e) of the Utah Rules of Criminal Procedure for the proposition that the trial court can "correct an illegal sentence, or a sentence imposed in an illegal manner, at any time." Babbel, 813 P 2d at 87 (citation omitted). The supreme court stated that "[t]he correction of an illegal sentence stands on a different footing from the correction of an error in a conviction." Id. at 88. Therefore, the court held that "the principles underlying" the cases holding that federal due process prohibits a harsher sentence from being imposed in a second trial for the same offense after a reversal of the first conviction, "have no application [to t]he correction of an illegal sentence." Id.

¶32 The initial sentence in the present case was illegal because it was improperly imposed in Defendant's absence. That was precisely how the first appeal was argued. When we remanded the case, we expressly noted that the court may correct an illegal sentence at any time. See State v. Samora, 2001 UT App 266 at n.1 (per curiam) (unpublished mem. decision) (referring to Utah R. Crim. P. 22(e)). My colleagues cannot now change course and hold that a sentence imposed contrary to law is not an illegal sentence. Rule 22(e) itself treats equally "an illegal sentence" and "a sentence imposed in an illegal manner." Utah R. Crim. P. 22(e). Because this case involves an illegal sentence, there can be no presumption of vindictiveness as described in North Carolina v. Pearce, 395 U.S. 711 (1969). See Babbel, 813 P.2d at 87-88. When it resentenced Defendant, the trial court was therefore not limited by the terms of the prior sentence. See id.; see also Texas v. McCullough, 475 U.S. 134 (1986) (quoting United States v. Goodwin, 457 U.S. 368, 374 (1982), for the proposition that "[n]othing in the Constitution requires a judge to ignore 'objective information . . . justifying the increased sentence'").

¶33 Accordingly, I would affirm the sentencing order.

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Russell W. Bench, Judge

1. Wanosik held that due process and Utah Rule of Criminal Procedure 22(a) require a trial court to conduct adequate inquiry into the actual voluntariness of Defendant's absence before proceeding to sentence in absentia. 2001 UT App 241, ¶37-38, 31 P.3d 615.
2. The burden is on the State to establish that Defendant's harsher sentence **did not violate the requirements of** due process and section 76-3-405. See North Carolina v. Pearce, 395 U.S. 711, 726, 89 S. Ct. 2072, 2081 (1969).
3. We discuss the colloquy in more detail later in this opinion.
4. The State's brief does not address the Pearce presumption of vindictiveness, arguing instead that because the original sentencing court did not know about restitution agreed to in the plea negotiations, the imposition of restitution at resentencing was necessarily nonretaliatory.

## ADDENDUM B

**76-3-405. Limitation on sentence where conviction or prior sentence set aside.**

(1) Where a conviction or sentence has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied.

(2) This section does not apply when:

(a) the increased sentence is based on facts which were not known to the court at the time of the original sentence, and the court affirmatively places on the record the facts which provide the basis for the increased sentence; or

(b) a defendant enters into a plea agreement with the prosecution and later successfully moves to invalidate his conviction, in which case the defendant and the prosecution stand in the same position as though the plea bargain, conviction, and sentence had never occurred.



UTAH RULES OF CRIMINAL PROCEDURE

**Rule 22. Sentence, judgment and commitment.**

(a) Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 45 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.

Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

(b) On the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence. If a defendant fails to appear for sentence, a warrant for defendant's arrest may be issued by the court.

(c) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed.

(d) When a jail or prison sentence is imposed, the court shall issue its commitment setting forth the sentence. The officer delivering the defendant to the jail or prison shall deliver a true copy of the commitment to the jail or prison and shall make the officer's return on the commitment and file it with the court.

(e) The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.

(f) Upon a verdict or plea of guilty and mentally ill, the court shall impose sentence in accordance with Title 77, Chapter 16a, Utah Code. If the court retains jurisdiction over a mentally ill offender committed to the Department of Human Services as provided by Utah Code Ann. § 77-16a-202(1)(b), the court shall so specify in the sentencing order.

(Amended effective January 1, 1995, January 1, 1996.)

CONSTITUTION OF THE UNITED STATES

**AMENDMENT V**

**[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## **AMENDMENT XIV**

### **Section 1. [Citizenship — Due process of law — Equal protection.]**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### **Sec. 2. [Representatives — Power to reduce appointment.]**

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

### **Sec. 3. [Disqualification to hold office.]**

No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

### **Sec. 4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]**

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

### **Sec. 5. [Power to enforce amendment.]**

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## ADDENDUM C

IMAGED

THIRD DISTRICT COURT-SALT LAKE COURT  
SALT LAKE COUNTY, STATE OF UTAH

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STATE OF UTAH, : MINUTES  
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT  
 :  
 :  
 :  
vs. : Case No: 001906887 FS  
 :  
MANUEL ERNESTO SAMORA, : Judge: J. DENNIS FREDERICK  
Defendant. : Date: September 22, 2000  
Custody: Salt Lake County Jail

S.C. # 103075

---

PRESENT  
Clerk: cindyb  
Prosecutor: MURPHY, J KEVIN  
Defendant not present  
Defendant's Attorney(s): WEST, JOHN K

ENTERED IN REGISTRY  
OF JUDGMENTS  
DATE 9-28-00

DEFENDANT INFORMATION  
Date of birth: August 21, 1958  
Video  
Tape Number: 1 Tape Count: 9:25-9:27

CHARGES

1. ATTEMPTED JOYRIDING W/ INTENT TO TEMP DEPRIVE OWNR (amended) -  
Class A Misdemeanor  
Plea: Guilty - Disposition: 08/08/2000 Guilty Plea

SENTENCE JAIL

Based on the defendant's conviction of ATTEMPTED JOYRIDING W/  
INTENT TO TEMP DEPRIVE OWNR a Class A Misdemeanor, the defendant is  
sentenced to a term of 1 year(s)

Commitment is to begin immediately.

Criminal Sentence, Judgment, Commitment



104514701

Case No: 001906887  
Date: Sep 22, 2000

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SENTENCE FINE

Charge # 1            Fine: \$2500.00  
                      Suspended: \$0.00  
                      Surcharge: \$2119.05  
                      Due: \$4619.05  
  
                      Total Fine: \$2500.00  
                      Total Suspended: \$0  
                      Total Surcharge: \$2119.05  
                      Total Principal Due: \$4619.05  
                                  Plus Interest

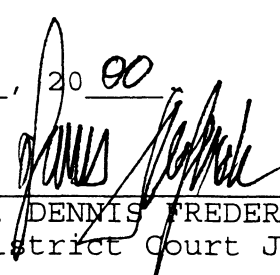
SENTENCE TRUST

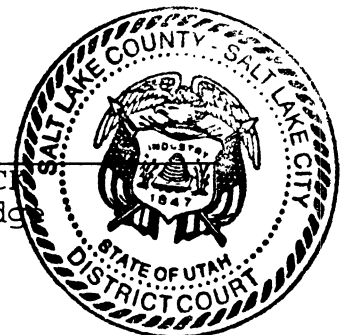
The defendant is to pay the following:  
Attorney Fees:            Amount: \$250.00 Plus Interest  
Pay in behalf of: LDA

Pay fine to The Court.

The Court finds defendant voluntarily absented himself from sentencing proceedings and the Court sentences the defendant in absentia. Counsel for the State to prepare the findings and order. Defendant to be committed forthwith upon his arrest on this Court's bench warrant.

Dated this 22<sup>nd</sup> day of Sept, 2000

  
J. DENNIS FREDERICK  
District Court Judge



## ADDENDUM D

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

State of Utah,  
Plaintiff and Appellee,

v

Manuel Ernesto Samora,  
Defendant and Appellant

MEMORANDUM DECISION  
(Not For Official Publication)

Case No 20000884-CA

FILED  
September 7, 2001

2001 UT App 266

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Third District, Salt Lake Department  
The Honorable J Dennis Frederick

Attorneys

Joan C Watt and John K West, Salt Lake City, for Appellant  
Mark L Shurtleff, Jeanne B Inouye, and Kevin Murphy, Salt Lake City, for Appellee

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Before Judges Greenwood, Billings, and Orme

PER CURIAM

Appellant Manuel Ernesto Samora appeals the sentence on his conviction of Attempted Joyriding, a class A misdemeanor

The issues raised in Samora's appeal are the same issues determined in State v Wanosik, 2001 UT App 241, 428 Utah Adv Rep 10, regarding sentencing in absentia and a criminal defendant's Utah Rule of Criminal Procedure 22(a) and Due Process rights. Accordingly, Samora is entitled to be resentenced under Wanosik because the district court did not (1) make an adequate inquiry into the actual voluntariness of Samora's absence before proceeding to sentence him in absentia, (2) provide Samora the opportunity to present information through counsel in mitigation of punishment and also provide the prosecutor an opportunity to present information relevant to sentencing, and (3) base the sentencing decision on relevant and reliable information regarding the crime, defendant's background, and the interests of society. See id. at ¶¶36-38.

The State seeks dismissal of this appeal, relying upon cases concluding that an appeal taken by a criminal defendant who is a fugitive may be dismissed, subject to reinstatement if the defendant returns to the jurisdiction and if the State cannot demonstrate that it will be prejudiced by reinstatement. See, e.g., State v Tuttle, 713 P 2d 703, 705 (Utah 1985). Because Wanosik is dispositive of Samora's appeal and requires a remand for resentencing, we decline to dismiss this appeal.<sup>(1)</sup> However, if Samora appeals the sentence imposed after



remand, the State may raise the dismissal argument in the subsequent appeal

We vacate the sentence and remand for resentencing in accordance with Wanosik

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Pamela T. Greenwood,  
Presiding Judge

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Judith M. Billings, Judge

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Gregory K. Orme, Judge

1 Even if we were to dismiss this appeal, Samora could challenge the sentence in the trial court under Rule 22(e) of the Utah Rules of Criminal Procedure. See Utah R. Crim. P. 22(e) ("The court may correct a sentence imposed in an illegal manner, at any time"), see also Wanosik, 241 UT App 241 at n. 11 (stating issues regarding illegality of the sentence under Rule 22(a) can be considered for the first time on appeal under Rule 22(e)). Judicial economy suggests that we resolve the appeal from the sentence and preserve the State's ability to seek dismissal in any appeal taken after resentencing.

## ADDENDUM E

IMAGED

THIRD DISTRICT COURT SALT LAKE COURT  
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, : MINUTES  
Plaintiff, : AMENDED SENTENCE, JUDGMENT,  
 : COMMITMENT  
 : SENTENCE, JUDGMENT, COMMITMENT  
 :  
 :  
 :  
vs. : Case No: 001906887 FS  
 :  
MANUEL ERNESTO SAMORA, : Judge: J. DENNIS FREDERICK  
Defendant. : Date: November 16, 2001  
Custody: Salt Lake County Jail

SO # 103075

PRESENT  
Clerk: cindyb  
Prosecutor: ESQUEDA, CARLOS A  
Defendant  
Defendant's Attorney(s): WEST, JOHN K

ENTERED IN REGISTRY  
OF JUDGMENTS  
DATE 11/19/01

DEFENDANT INFORMATION  
Date of birth: August 21, 1958  
Video  
Tape Number: 1 Tape Count: 9:54-10:02

CHARGES

1. ATTEMPTED JOYRIDING W/ INTENT TO TEMP DEPRIVE OWNR (amended)  
Class A Misdemeanor  
Plea: Guilty - Disposition: 08/08/2000 {Guilty Plea}

SENTENCE JAIL

Based on the defendant's conviction of ATTEMPTED JOYRIDING W/  
INTENT TO TEMP DEPRIVE OWNR a Class A Misdemeanor, the defendant is  
sentenced to a term of 1 year(s)

Commitment is to begin immediately.

Minutes for Amended Sentence, Judgment,



001906887 JD2142795 SAMORA, MANUEL

JD

Case No: 001906887  
Date: Nov 16, 2001

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SENTENCE JAIL SERVICE NOTE

Credit for time served is granted originally awaiting disposition in this case. No credit will be given after warrant was issued and defendant arrested.

SENTENCE FINE

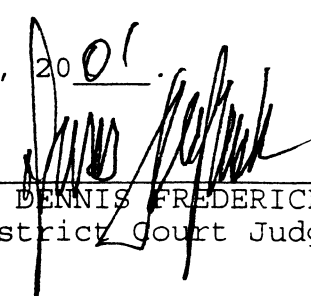
Charge # 1            Fine: \$2500.00  
                      Suspended: \$0.00  
                      Surcharge: \$2119.05  
                      Due: \$4619.05  
  
                      Total Fine: \$2500.00  
                      Total Suspended: \$0  
                      Total Surcharge: \$2119.05  
                      Total Principal Due: \$4619.05  
                                  Plus Interest

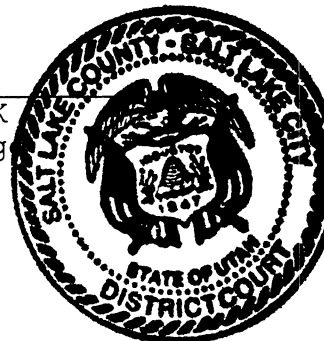
SENTENCE TRUST

The defendant is to pay the following:  
Attorney Fees:            Amount: \$500.00 Plus Interest  
Pay in behalf of: LDA

Restitution:            Amount: \$744.80

Dated this 16<sup>th</sup> day of Nov., 2001.

  
J. DENNIS FREDERICK  
District Court Judge



ADDENDUM F

Appellant's Opening Brief in Samora I, Pages 2-4

Standard of Review. This issue involves a question of law which is reviewed for correctness. See State v. Anderson, 929 P.2d 1107, 1110 (Utah 1996) (issue of whether defendant was properly sentenced in absentia involves a question of law). In addition, the ultimate issue as to whether Appellant voluntarily absented himself from sentencing is reviewed for correctness. See generally State v. Ham, 910 P.2d 433, 438 (Utah App. 1996) (reviewing ultimate issue of whether consent to search was voluntary for correctness). While a trial judge ordinarily has discretion in sentencing, such discretion is not unlimited. See State v. Johnson, 856 P.2d 1064, 1071 (Utah 1993) (recognizing trial court exceeds its discretion when it fails to sentence based on reliable and relevant information, and reviewing question of whether trial judge sentenced defendant based on reliable and relevant information as a question of law). Any underlying factual findings are reviewed for clear error. See generally State v. Pena, 869 P.2d 932, 935 (Utah 1994) (factual findings are reviewed for clear error).

Preservation. Although defense counsel was not given an opportunity to speak, the trial court nevertheless considered the issue of whether it was appropriate to proceed, and concluded that Appellant had voluntarily absented himself (R. 64:2). A copy of the sentencing transcript is in Addendum B. The trial court also entered findings of fact and conclusions of law, a copy of which is in Addendum C (R. 44-45). In fact, although the parties were never given the opportunity to address the issue of whether proceeding in absentia was appropriate under the circumstances of the case, the prosecutor was able to

prepare findings and conclusions on that issue (R. 64:2). Because the trial court considered this issue below, it is properly preserved for appellate review. See State v. Eldredge, 773 P.2d 29, 36 (Utah 1989) (purpose of requiring that an issue be raised in the trial court is to allow the trial judge to review the issue and correct an error).<sup>1</sup>

Alternatively, the trial judge committed plain error in proceeding in absentia and in failing to base the sentencing decision on relevant and reliable information without affording defense counsel the opportunity to speak. See Johnson, 856 P.2d at 1071; Utah R. Crim. P. 22; State v. Dunn, 850 P.2d 1201, 1208-09 (Utah 1993) (plain error occurs when an error is obvious and prejudices the defendant). Under Johnson and Utah R. Crim. P. 22(a), the error in failing to conduct a full sentencing hearing was obvious as was the denial of Samora's right to presence at sentencing pursuant to Article I, section 12, Utah Constitution. The obvious error prejudiced Samora since he received the maximum sentence when he otherwise was a candidate for probation; see discussion infra at 11.

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<sup>1</sup> The purposes of the preservation rules are to: (1) allow trial counsel the opportunity to review and correct any errors, and (2) preclude defense counsel from foregoing objections as a matter of strategy and when the strategy does not work and defendant is convicted, claiming error. Eldredge, 773 P.2d at 36; State v. Labrum, 925 P.2d 937, 939 (Utah 1996); State v. Bullock, 791 P.2d 155, 159 (Utah 1989), *cert. denied*, 497 U.S. 1024 (1990). In this case where the trial judge reviewed the issue of whether to proceed in absentia at sentencing and entered findings and conclusions on that issue, both of those purposes were met. The trial court had the opportunity to review the issue and correct the error, and no possible trial strategy existed for foregoing the objection. Accordingly, the issue was properly preserved for appeal.

Finally, the issue should also be reviewed because exceptional circumstances justifying review exist in this case. See State v. Irwin, 924 P.2d 5, 11 (Utah App. 1996). Utah R. Evid. 22(a) requires a trial judge to afford defendant the opportunity to provide relevant information at sentencing; due process requires the judge to conduct a full and fair sentencing hearing. Where the judge does not afford counsel the opportunity to speak and does not conduct a full and fair sentencing hearing, a procedural anomaly requiring review exists. See id. (exceptional circumstances doctrine generally applies to rare procedural anomalies). In addition, the question of whether the trial judge imposed legal sentence is of widespread interest as evidenced by the number of cases before this Court raising a similar issue. Id. (doctrine of exceptional circumstances may be applied where "matters of extraordinary importance or widespread interest" exist). Without appellate review, the egregious violation of due process, Utah R. Crim. P. 22 and the right to presence which occurred in this case would go unchecked. In this case where the trial judge had the obligation to conduct a full and fair sentencing hearing and failed to do so, exceptional circumstances require that this Court review the issue on appeal.

Issue 2. Whether Appellant waived his right to appeal by failing to appear at sentencing.

Preservation. The state raised this issue in its response to this Court's *sua sponte* motion for summary disposition. This Court ordered that this issue be considered as part of the plenary review of this case. See Addendum D.



## ADDENDUM G

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah,  
Plaintiff and Appellee,

v

Thomas C Headley,  
Defendant and Appellant

MEMORANDUM DECISION  
(Not For Official Publication)

Case No 990462-CA

FILED  
February 28, 2002

2002 UT App 58

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Third District, Salt Lake Department  
The Honorable Tyrone Medley

Attorneys  
Edward R Montgomery, Salt Lake City, for Appellant  
Mark L Shurtleff and Thomas Brunker, Salt Lake City, for Appellee

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Before Judges Jackson, Greenwood, and Thorne

JACKSON, Presiding Judge

Thomas Headley appeals the district court's denial of his Motion to Correct Illegal Sentence submitted under Rule 22(e) of the Utah Rules of Criminal Procedure. He contends the district court erred in ruling that his motion did "not attack the legality of the sentence imposed nor the manner in which the sentence was imposed." Headley's contention is two-fold: (1) his counsel at sentencing provided ineffective assistance, and (2) the sentencing court relied on information in the presentence report that the court knew was false. We affirm.

A district court's Rule 22(e) decision is a legal question that we review for correctness, see *State v. Brooks*, 908 P.2d 856, 858-59 (Utah 1995), *State v. Patience*, 944 P.2d 381, 384-85 (Utah Ct. App. 1997), and we can affirm the decision "if it is sustainable on any legal ground or theory apparent on the record." *State v. Finlayson*, 2000 UT 10, ¶31, 994 P.2d 1243. Rule 22(e) of the Utah Rules of Criminal Procedure provides for resentencing when a sentence is illegal or "imposed in an illegal manner." Utah R. Crim. P. 22(e). The definition of an "illegal sentence" has been construed narrowly to include only sentences "where the sentence does not conform to the crime of which the defendant has been convicted." <sup>(1)</sup> *State v. Parker*, 872 P.2d 1041, 1043 n.2 (Utah Ct. App. 1994). Utah law has no comprehensive definition of sentences "imposed in an illegal manner", however, the Utah Supreme Court has ruled that a sentence is imposed in an illegal manner when a defendant is deprived of his or her Sixth Amendment right to counsel during sentencing. <sup>(2)</sup> See *Kuehnert v. Turner*, 28 Utah 2d 150, 499 P.2d 839, 841 (1975) (concluding that the sentence was illegal because the defendant did not have counsel at sentencing, was

not informed of his Sixth Amendment rights during sentencing, and had not knowingly and intelligently waived his Sixth Amendment rights) <sup>(3)</sup> In Kuehnert, the Utah Supreme Court stated that the presence of counsel at sentencing is necessary

so that there is a real opportunity to present to the court facts in extenuation of the offense or in explanation of the defendant's conduct, as well as to correct any errors or mistakes in reports of the defendant's past record and to appeal to the equity of the court in its administration and enforcement of penal laws

Id. at 840-41 <sup>(4)</sup>

Headley first claims his counsel at sentencing provided ineffective assistance, thus depriving him of his Sixth Amendment right. To support his claim, Headley makes six assertions, four are as follows: (1) he asserts that his challenge to misinformation in the presentence investigation report was rejected by the sentencing court because it was poorly handled by sentencing counsel, (2) he challenges several factual statements contained in the presentence investigation report, (3) he asserts that "his own counsel accused him of being involved in incest when that information was not otherwise before the court", and (4) he asserts that "his [sentencing] counsel convinced a witness with potentially exculpatory evidence not to cooperate with [Headley]". Each of these four assertions has some connection with the presentence investigation report, which is not in the record on appeal. Further, no other information in the record supports these assertions. Accordingly, as discussed below, we are unable to address them.

Next, Headley claims the sentencing court imposed a \$10,000 fine without reason and without objection by his counsel. We find no mention of a \$10,000 fine in the record. The only fines mentioned in the sentencing context, a \$1,000 recoupment fee and an unspecified amount to "pay for costs of extradition and for therapy of victim," are found in the sentencing transcript and the Judgment filed three days later. Finally, Headley alleges that "his counsel intentionally tried to prevent him from pursuing an appeal." However, the record reflects that Headley filed a notice of appeal on September 24, 1992, but voluntarily moved to dismiss his appeal to "file a motion to withdraw his plea of guilty." Headley's motion was granted on October 8, 1992, and the record contains no indication of subsequent attempts to appeal the case.

Without the presentence report or other information which may or may not be in the sentencing court record, the record submitted to us is inadequate for our review of Headley's ineffective assistance claim. All we have are Headley's unilateral, bald assertions of misconduct. As we have stated,

When a defendant predicates error to [an appellate court], he has the duty and responsibility of supporting such allegation by an adequate record. Absent that record, a defendant's assignment of error stands as a unilateral allegation which the reviewing court has no power to determine. [An appellate court] simply cannot rule on a question which depends for its existence upon alleged facts unsupported by the record. Consequently, in the face of an [in]adequate record on appeal, [we] must assume the regularity of the proceedings below.

State v. Penman, 964 P.2d 1157, 1162 (1998) (internal quotations and citations omitted) (alterations in original), see also State v. Litherland, 2000 UT 76, ¶17, 12 P.3d 92 ("Where the record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively.") Accordingly, we reject Headley's Sixth Amendment claim.

Next, Headley claims the sentencing court was biased because it relied on information in the presentence report that the court knew was false. Utah Code Ann. § 77-18-1(6) (Supp. 2001) gives a sentencing judge discretion in evaluating information in a presentence report and requires the judge to "make a determination of relevance and accuracy on the record." Here, the sentencing judge made a determination of the relevance and accuracy of the presentence report, deciding the presentence report was "comprehensive in all the details," and stating that those working on elements of the presentence report "do a pretty good job." The sentencing court has broad discretion to resolve factual disputes for or against a defendant, see id., and we cannot say the court exceeded its discretion in making this determination. Further, without the presentence report, the record is inadequate and "[we] must assume the regularity of the proceedings below." Penman, 964 P.2d at 1162 (citation omitted) (alteration in original).

Accordingly, we affirm the district court's denial of Headley's Rule 22(e) motion for resentencing

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Norman H. Jackson,  
Presiding Judge

I CONCUR

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William A. Thorne Jr., Judge

GREENWOOD, Judge (concurring in the result)

I concur in the result reached by my colleagues, but would affirm on what I perceive to be a more straightforward basis. As stated by the majority, the trial court denied defendant's Rule 22(e) motion because the motion did "not attack the legality of the sentence imposed nor the manner in which the sentence was imposed." The trial court was correct.

Defendant's claims of ineffective assistance of counsel and erroneous fact findings by the sentencing judge are simply not cognizable under Rule 22(e). Defendant has not cited any caselaw holding otherwise and has also not offered any reasoned analysis for why Rule 22(e) should apply to his case. See State v. Thomas, 961 P.2d 299, 305 (Utah 1998) (briefs must include "reasoned analysis based on [cited] authority"). The sentence imposed was permissible under applicable statutes, and the trial court properly resolved factual disputes presented to it. Defendant raises no claims legitimately related to whether the sentence was illegal or "imposed in an illegal manner." Utah R. Crim. P. 22(e). On that basis, I would affirm.

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Pamela T. Greenwood, Judge

1. Nonconforming sentences include those where the sentence exceeds the statutory limits. See, e.g., State v. Higginbotham, 917 P.2d 545, 551 (Utah 1996) (concluding that the sentence was illegal because statute only authorized one year enhancement and the court enhanced sentence by two years), State v. Patience, 944 P.2d 381, 388 (Utah Ct. App. 1997) (noting that the sentence was illegal because it exceeded statutory term). Nonconforming sentences also occur when the court is without jurisdiction to impose a sentence. See, e.g., State v. Hurst, 777 P.2d 1029, 1036 n.6 (Utah 1989) (stating that sentences can be attacked when beyond the jurisdiction of the sentencing court), State v. Arviso, 1999 UT App 381, ¶¶5-8, 993 P.2d 894 (stating that the sentence was illegal because Supremacy Clause deprived sentencing court of jurisdiction), State v. Grate, 947 P.2d 1161, 1168 (Utah Ct. App. 1997) (stating that the sentence was illegal because court did not have jurisdiction to revoke probation).

2. Other jurisdictions have defined sentences imposed in an illegal manner as those that are within statutory and jurisdictional limits, but violate a defendant's rights, see, e.g., Government of the V.I. v. Martinez, 239 F.3d 293, 299 n.3 (3rd Cir. 2001), State v. McNellis, 546 A.2d 292, 305-06 (Conn. Ct. App. 1988), State v. Sieler, 554 N.W.2d 447, 479 (S.D. 1996), cf. State v. Anderson, 661 P.2d 716, 720-24 (Haw. Ct. App. 1983), State v. Brooks, 589 A.2d 444, 447 (Maine 1991), or that are based on erroneous information. See, e.g., United States v. Katzin,

824 F.2d 234, 238 (3rd Cir. 1987).

3. Kuehnert, which discusses illegal sentences under the rules in force prior to Rule 22(e), was not cited in the parties' briefs.

4. See also McConnell v. Rhay, 393 U.S. 2, 4, 89 S. Ct. 32, 33-34 (1968) ("As we said in Mempa v. Rhay, 389 U.S. 128, 135, 88 S. Ct. 254, 257 (1967)], 'the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances[,] and in general aiding and assisting the defendant to present his case as to sentence is apparent.' The right to counsel at sentencing must, therefore, be treated like the right to counsel at other stages of adjudication." (Citation omitted.)).